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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

MARY ALTICK,

Plaintiff and Respondent,

v.

ANTONIO HERNANDEZ,

Defendant and Appellant.

E069644

(Super.Ct.No. CIVDS1712322)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,  
Judge. Affirmed.

Antonio Hernandez, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## I.

### INTRODUCTION

The parties in this case, defendant and appellant, Antonio Hernandez doing business as Universal Estates (Hernandez), and plaintiff and respondent, Mary “Marisa” Altick, were involved in a real estate commission dispute. Pursuant to an independent contractor agreement between Hernandez, the real estate broker and licensee, and Altick, the sales agent, the parties agreed to arbitrate their commission disputes on listings procured by Altick. Altick initiated binding arbitration to recover her sales commission from Hernandez and was awarded \$51,887.

Altick filed a petition to confirm the binding arbitration award in the trial court. (Code Civ. Proc., § 1288.)<sup>1</sup> Hernandez opposed Altick’s petition and requested the trial court to issue an order vacating the arbitration award. At the hearing, the trial court ruled Hernandez’s opposition and request to vacate the arbitration award were untimely. The court granted Altick’s petition to confirm the binding arbitration award and entered judgment in favor of Altick. Thereafter, Hernandez filed a separate petition to vacate the arbitration award and set aside judgment. The trial court ruled Hernandez’s petition to vacate the arbitration award was untimely, but ultimately considered the merits of Hernandez’s petition and denied it.

On appeal, Hernandez argues that (1) the trial court erred in denying his motion to vacate the arbitration award because it did not consider three e-mails submitted

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<sup>1</sup> All further references are to the Code of Civil Procedure.

postarbitration that contradicted Altick's "testimony during the arbitration," and (2) the trial court erred by not holding an evidentiary hearing on Hernandez's motion to vacate the arbitration award to allow the people involved in the transaction to testify.

We find no reversible error and affirm the postjudgment order denying Hernandez's petition to vacate the arbitration award.

## II.

### FACTUAL AND PROCEDURAL HISTORY

In January 2013, Altick's father died and left in his family trust, real property, a residence, in Northern California (the Property). In 2015, Altick was living in the Property. After Altick obtained her real estate license in 2015, she wanted to sell the Property and move to Southern California. She was referred to Hernandez, a Southern California licensed real estate broker.

On September 1, 2015, Hernandez and Altick entered into an independent contractor agreement, which named Hernandez as broker and Altick as associate licensee. Pursuant to the agreement, Altick agreed to use her best efforts to sell, exchange, lease, or rent properties listed with the broker, Hernandez, solicit additional listings, clients, and customers, and otherwise promote the business of serving the public in real estate transactions to the end that both Hernandez and Altick might derive the greatest benefit possible. Under paragraphs 8.A. and 8.B. of the agreement, Hernandez was entitled to receive one-third of the commission, and Altick was entitled to receive two-thirds of the

commission if Hernandez's brokerage represented one side of any property sales transaction in which Altick was the procuring cause.

One week after Altick and Hernandez executed their independent contractor agreement, Altick, as trustor of the family trust, signed an exclusive listing contract to sell the Property with Hernandez's brokerage. The Property was listed in the multiple listing service (MLS) and the listing was paid for by Altick. In February 2016, the Property sold and escrow closed. When Hernandez failed to pay Altick's share of the commission for the sale of the Property, Altick initiated binding arbitration to resolve the commission dispute.

*A. The Arbitration Award*

During the arbitration hearing, Altick testified that Hernandez agreed to mentor her during her first sales transaction, and pursuant to their independent contractor agreement, Altick expected a sales commission. Altick paid for the Property's MLS listing, which initially stated "owner is co-listing agent." At some point after signing the initial listing agreement, Altick's name was removed entirely from the Property's MLS listing information.

Between September and December 2015, when the Property sold, Altick held numerous open houses and broker tours, made a flyer identifying herself as the sales agent, and paid for the Property's advertising and staging expenses. Hernandez never saw the Property but handled all sales negotiations. During escrow, Altick learned that the entire \$32,725 sales commission was to be paid to Hernandez. When she questioned

Hernandez about receiving payment of her share of the commission, Hernandez explained that he was being paid the entire sales commission because he had to first pay the taxes on the income. Later on, during a phone call, Hernandez tried to convince Altick to change Altick's agreed upon share of the commission, but Altick told him "no." If Altick had known that Hernandez would back out of their commission agreement, she would have listed the Property with another broker.

Hernandez testified that he told Altick up front that she would not be named as the Property's listing agent in order to avoid any conflict of interest with the trust beneficiaries. He took over the Property listing and removed Altick's name as listing agent from the flyer when he discovered the family trust owned the Property. He admitted that Altick had paid the MLS fee and that she had advertised the Property for sale. Hernandez denied receiving a call from Altick expressing concern over the nonpayment of commission.

The arbitrator examined the Property's sale transactional documents and found that none of the documents identified Altick as the listing agent. Nevertheless, the arbitrator considered whether Altick was entitled to receive a commission under paragraph 8. of the independent contractor agreement. In deciding the arbitration award in Altick's favor, the arbitrator reasoned (1) the Property was listed one week after the parties entered into their independent contractor agreement, (2) Altick arranged for the MLS listing of the Property and was initially listed as "co-listing agent," (3) Altick created a sales flyer that identified her as the listing agent for the Property, (4) she

conducted numerous open houses, including broker tours, (5) Hernandez had acquiesced in Altick's marketing activities, (6) the flier modified by Hernandez identified Altick as owner, but listed Altick's real estate license number next to her contact information, (7) Hernandez had never seen the Property, and (8) Altick's activities throughout the three-month period the Property was listed for sale were consistent with that of an agent showing the Property.

Based on these facts, on June 6, 2017, the arbitrator concluded that Altick was the "procuring cause," of the transaction under paragraph 8. of the parties' independent contractor agreement and rendered a final binding arbitration award finding that Altick was entitled to her share of the commission for the sale of the Property.

*B. Altick's Petition to Confirm the Arbitration Award*

On July 24, 2017, Altick filed a petition to confirm the binding arbitration award and enter judgment. On August 9, 2017, Hernandez filed an opposition to Altick's petition. In his opposition, Hernandez asked the court to issue an order vacating the arbitration award. Altick opposed Hernandez's request to vacate the arbitration award as untimely. Altick argued that Hernandez had failed to establish any statutory ground for vacating the award. Altick also objected to Hernandez's supporting evidence. In a supplemental response to Altick's evidentiary objections, Hernandez submitted a verified e-mail of the buyer, McDaniel, in support of his contention that Altick had testified falsely at the arbitration hearing.

On October 3, 2017, the hearing to confirm the arbitration award was held. The trial court sustained Altick's evidentiary objections on the hearsay and foundational grounds. The court considered Hernandez's untimely opposition but did not rule on Hernandez's request to vacate the arbitration award. The court granted Altick's motion to confirm the arbitration award but denied Altick's request for additional attorney fees. Judgment was entered confirming the binding arbitration award in Altick's favor.

*C. Hernandez's Separate Petition to Vacate the Arbitration Award and Set Aside the Judgment*

On October 26, 2017, Hernandez filed a petition to vacate the arbitration award and set aside the judgment on the ground that Altick had provided false testimony during the arbitration hearing. In support of his petition, Hernandez submitted the buyer, Christine McDaniel's, verified e-mail, and e-mails from two sales agents, Michael Langhals and Sudha Schlesinger, which were verified under penalty of perjury at the bottom of the e-mails. Altick opposed Hernandez's petition to vacate the arbitration award as untimely, barred by collateral estoppel, and unsupported by lack of statutory authority.

On November 17, 2017, the trial court held a hearing on Hernandez's petition. Although the trial court initially ruled Hernandez's petition was not timely, the court considered the merits of the petition and sustained Altick's evidentiary objections to Hernandez's e-mail evidence on hearsay grounds. The trial court denied Hernandez's

petition to vacate the arbitration award and set aside the judgment, concluding Hernandez had failed to establish any valid grounds for vacating the arbitration award.

On December 14, 2017, Hernandez appealed the order denying his petition to vacate the arbitration award.

### III.

#### TIMELINESS OF HERNANDEZ’S PETITION TO VACATE THE ARBITRATION AWARD

In opposing Hernandez’s petition to vacate the arbitration award, Altick argued the petition was not timely filed. The trial court agreed but nonetheless considered the merits of the petition. We agree that Hernandez’s petition was not timely filed.

A party may petition the trial court to confirm, correct, or vacate an arbitration award. (§ 1285.) A party may also seek to have an arbitration award corrected or vacated by filing opposition to a petition to confirm an arbitration award. (§ 1285.2.) A petition to confirm an arbitration award may be filed within four years of the date the petitioner was served with the arbitration award. (§ 1288.) A petition to vacate or correct an arbitration award may be filed within 100 days of the petitioner being served with the arbitration award. (§ 1288.) “When one side files a petition to confirm the award, the other side must respond within 10 days.” (*Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 66; § 1290.6.) A response requesting to vacate or correct an arbitration award may also be served and filed within 100 days of service of the arbitration award. (§ 1288.2, subd. (a).)



Here, Altick filed a petition to confirm the arbitration award on July 24, 2017. Hernandez filed his request to vacate the arbitration award on August 9, 2017. Under section 1290.6, Hernandez's request was required to be filed within 10 days, by August 8, 2017. (*Oaktree Capital Management, L.P. v. Bernard, supra*, 182 Cal.App.4th at p. 66.) Hernandez's opposition, which included a request to vacate the arbitration award, was untimely, because it was filed a day late, on August 9, 2017. In addition, Hernandez's subsequent petition to vacate the arbitration award was untimely because it was filed on October 26, 2017, after the trial court confirmed the arbitration award and more than 100 days after service thereof. (§ 1288.) Although we conclude Hernandez's petition to vacate the arbitration award was untimely, we will address the merits of Hernandez's objections to the trial court's ruling on the petition.

#### IV.

#### DENIAL OF HERNANDEZ'S PETITION TO VACATE THE BINDING ARBITRATION AWARD

In support of his petition, Hernandez submitted three e-mail statements from McDaniel, Langhals and Schlesinger, to show Altick committed perjury during the arbitration hearing. On appeal, Hernandez contends the trial court erred because it rejected the three signed e-mail "declarations" that supported vacating the arbitration award.

Schlesinger's September 14, 2016, e-mail to Hernandez states that Hernandez was the only agent listed in the MLS, and there was no indication that the seller was a

licensed agent. Schlesinger's e-mail discusses open houses by the seller and asserts that every contact with the Property was with Hernandez as the listing agent. Schlesinger's e-mail was then printed out and certified under penalty of perjury over one year later on September 18, 2017.

Langhals's September 15, 2016, e-mail to Hernandez states his clients backed out of purchasing the Property. Langhals states his sales interactions were with Hernandez, but Altick provided access to the Property when it was shown and during Property inspections. Langhals also states Altick mentioned that she was licensed and worked with Hernandez. Langhals's e-mail was then printed and certified under penalty of perjury one year later on September 15, 2017.

McDaniel's September 3, 2017, e-mail to Schlesinger states that McDaniel contacted Schlesinger, who gave McDaniel a phone number. McDaniel called and met with a real estate agent, not "Marisa." "Marisa" and her son let McDaniel into the property, but they did not discuss prices. McDaniel's e-mail was then printed out and certified under penalty of perjury on September 13, 2017.

In ruling on Hernandez's petition to vacate the arbitration award, the trial court sustained Altick's evidentiary objections to the e-mail evidence on hearsay grounds. The trial court also rejected Hernandez's claim that Altick's arbitration award was procured by fraud. The court further reasoned it could not evaluate new evidence and reweigh it. Where the trial court has resolved questions of law on undisputed facts when ruling on a

request to vacate an arbitration award, we review the trial court's ruling de novo.

(*Cooper v. Lavelly & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 12.)

We agree that the e-mails are hearsay evidence. We also find that Hernandez could have presented the statement evidence during the arbitration hearing, and as we explain below, the e-mail evidence does not establish that the arbitration award was procured by fraud. (§ 1286.2, subd. (a)(1).)

““Hearsay evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.’ (Evid. Code, § 1200, subd. (a).) Generally, hearsay evidence is inadmissible unless the law provides an exception for its admission. (Evid. Code, § 1200, subd. (b).) Double hearsay is admissible if each level falls within an exception to the hearsay rule.” (*Dicola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.) Here, Hernandez offered the three out-of-court statements to prove his claim that Altick testified falsely at the arbitration hearing. Therefore, the court properly rejected the evidence on hearsay grounds.

We also agree that the trial court could not reweigh the evidence and consider new evidence that was not presented during the arbitration hearing. Judicial review of private binding arbitration awards is extremely narrow and cannot be reviewed for errors of fact or law. (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11-13.) An arbitrator is not ordinarily constrained to decide the arbitration decision according to the rule of law and may base the decision upon broad

principles of justice and equity. (*Moncharsh, supra*, at p. 11.) As a result, arbitration awards reached during contractual arbitration are only reviewed on limited statutory grounds that are set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). (*Moncharsh, supra*, at p. 33.)

Section 1286.2 allows a trial court to vacate an arbitration award if it has been “procured by corruption, fraud or other undue means.” (§ 1286.2, subd.(a)(1).) “Fraud, as that term is used in section 1286.2, subdivision (a)(1), is that perpetrated by the arbitrator or a party. Only extrinsic fraud which denies a party a fair hearing may serve as a basis for vacating an award.” (*Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 825, review denied.)

Fraud is either intrinsic or extrinsic. Classic examples of intrinsic fraud include the introduction of perjured testimony or false documents in a fully litigated case. (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 828.) The party seeking to vacate an arbitration award based on fraud under section 1286.2, subdivision (a)(1) has the burden of satisfying a three-part test: “First, the movant must establish the fraud by clear and convincing evidence. [Citations.] Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. [Citations.] Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration. [Citations.]” (*Pour Le Bebe, Inc., supra*, at p. 830.)

Perjury constitutes intrinsic fraud, which cannot be used to overturn a judgment, even when a party is unaware of the fraud and does not have an opportunity to raise it in the litigated case. (*Pour Le Bebe, Inc. v. Guess? Inc.*, *supra*, 112 Cal.App.4th at pp. 828-829; see also *Buesa v. City of Los Angeles* (2009) 177 Cal.App.4th 1537, 1548 [alleged perjury from an earlier proceeding subject to the finality of judgments doctrine].) However, the court in *Pour Le Bebe, Inc.* recognized that parties to arbitration are not afforded the same procedural rights available to civil trial litigants and recommended the courts “take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award.” (*Pour Le Bebe, Inc.*, *supra*, at p. 829.)

Even if we were to consider the e-mail evidence, Hernandez cannot meet his burden to establish that Schlesinger’s, Langhals’s and McDaniel’s statements were not known to him prior to the arbitration hearing because both Schlesinger’s and Langhals’s e-mails were sent to Hernandez well before the parties’ arbitration hearing on April 14, 2017. At the bottom of Schlesinger’s e-mail, an e-mail thread from Hernandez states that he just printed out all their e-mails and the chain of e-mails indicates that he was the listing agent and the procuring cause. Additionally, Hernandez reasonably should have been aware that the buyer, McDaniel, who sent the September 2017 e-mail to Schlesinger, could provide a statement that might support his claim at arbitration that he was “the procuring cause.” Consequently, Hernandez cannot establish that the e-mail statement evidence was unavailable or not discoverable prior to the parties’ arbitration.

Notwithstanding, the three e-mails do not establish Altick's fraud by clear and convincing evidence. Langhals's e-mail states Altick provided access to the Property, and she was present during the Property inspections. Langhals further states that Altick told Langhals that she was a licensed real estate agent working with Hernandez. Schlesinger, a realtor representing McDaniel, states that McDaniel attended an "open house." McDaniel's e-mail states that she looked at the Property several times, and Altick and her son were present and let McDaniel inside the residence.

Based on our review of the record, we find that Hernandez's admissions during arbitration, that Altick "paid the MLS fees for the listing and did all of the advertising" for the sale of the Property, along with the three e-mails, support the arbitrator's finding that Altick's "activities throughout the three months of time were more consistent with that of a real estate agent showing a listing." We conclude the trial court reasonably denied Hernandez's petition to vacate the binding arbitration award because he failed to show the arbitration award was procured by fraud. (§ 1286.2, subd. (a)(1).)

V.

HERNANDEZ’S ORAL MOTION FOR AN EVIDENTIARY HEARING

During the hearing on Hernandez’s petition to vacate the arbitration award, Hernandez asked the trial court to hold an evidentiary hearing to allow testimony by Altick and McDaniel. The trial court rejected this request and explained to Hernandez that he had not shown any “basis in the law” to hold such a hearing. On appeal, and without citing to any authority, Hernandez argues the trial court violated his due process rights by not holding an evidentiary hearing.

We reject this contention because judicial review of a binding arbitration award is extremely narrow and cannot be reviewed for errors of fact or law, absent statutory grounds shown. (*Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at pp. 11-13.) The statutory scheme provides a summary procedure for resolving petitions in the same manner as hearing of motions. (§ 1290.2.) Hernandez’s due process rights to a fair hearing were not violated because the court conducted a hearing on Hernandez’s petition to vacate the arbitration award and Hernandez presented evidence. The evidence did not support a finding of extrinsic fraud (§ 1286.2, subd. (a)(1)), and Hernandez did not demonstrate good cause to continue the matter to allow testimony by Altick and McDaniel. The trial court therefore properly denied his request for an evidentiary hearing.

VI.

DISPOSITION

The judgment is affirmed. Altick is awarded her costs on appeal, if any.

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CODRINGTON  
Acting P. J.

We concur:

SLOUGH  
J.

RAPHAEL  
J.